Supreme Court, U. S.
FILED
JAN 26 1979
MICHAEL RODAK, JR., CLERK

No. 78-828

In the Supreme Court of the United States

OCTOBER TERM, 1978

H. BARRY RESSLER and OSCAR M. WILLIAMS,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-828

H. BARRY RESSLER and OSCAR M. WILLIAMS,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners seek review of the decision below holding that the government's suit to collect unpaid taxes was within the limitations period prescribed by Section 6502(a) of the Internal Revenue Code of 1954 (26 U.S.C.), as extended by the submission of an offer in compromise.

The pertinent facts are as follows: On August 1, 1975, the United States brought suit to collect peti-

tioner Ressler's unpaid taxes, to set aside as fraudulent certain conveyances of real property made by him,[1] and to foreclose certain federal tax liens. At the time, Ressler was liable for taxes of $33,619.01[2] (Pet. App. A-1 to A-2). The earliest assessment involved was made on April 8, 1965. On December 8, 1969, Ressler made an offer in compromise of his tax liability. The offer, set forth on the Internal Revenue Service's standard Form 656, contained the usual provision extending the statute of limitations on assessment and on collection "for the period during which this offer is pending * * *, and for 1 year thereafter" (Pet. App. A-2). On January 6, 1970, the District Director accepted the waiver by signing the form (Pet. App. A-3).

In 1972, Ressler was indicted for filing a false financial statement in connection with his offer in compromise.[3] On February 27, 1973, he pleaded guilty to a violation of 26 U.S.C. 7207 for his false statement, and was sentenced on that date. On May

---

[1] Petitioner Williams was one of the parties to whom these conveyances were made.

[2] The federal tax assessments against Ressler are liabilities for unpaid income taxes and taxes imposed by 26 U.S.C. 6672 upon persons responsible for withholding tax liabilities. The income tax assessments are for 1958-1965, 1967-1971 and 1973-1974. The Section 6672 assessments are for quarters in 1961, 1962, and 1970-1972 (R. 193). "R." references are to the Record Appendix filed in the court of appeals.

[3] The charge arose from Ressler's failure to list certain assets on the financial statement (R. 198-199).

3, 1973, the Internal Revenue Service formally rejected the offer (Pet. App. A-4).

After a nonjury trial in this suit brought by the government against petitioners to collect the unpaid taxes and to set aside as fraudulent certain conveyances of real property made by Ressler, the district court found that the conveyances were fraudulent as to the United States and entered judgment against Ressler for $33,619.01 plus statutory additions (Pet. App. A-1 to A-2). The court of appeals affirmed *per curiam*. It held that the action was not barred by the six-year statute of limitations for collection after assessments (26 U.S.C. 6502(a)) because Ressler and the government agreed to extend the statute beyond the date on which the complaint was filed (Pet. App. A-1 to A-5).

1. The court of appeals correctly held that this suit to collect outstanding tax assessments was not barred by the statute of limitations.

Section 6502(a) of the Internal Revenue Code of 1954 provides that assessed taxes may be collected by a proceeding in court "but only if * * * the proceeding [is] begun—(1) within 6 years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Secretary and the taxpayer before the expiration of such 6-year period * * *." The statute further provides that "The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon."

As the court of appeals observed, the earliest assessment against petitioners was made on April 8, 1965 so that the statute of limitations would have normally expired six years later on April 8, 1971. However, on December 8, 1969, petitioner Ressler made an offer of compromise of his tax liabilities. The offer, set forth on IRS Form 656, contained a standard provision pursuant to which Ressler agreed to the suspension of the running of the statute of limitations on collection for the period during which the offer remained pending and for one year thereafter. The District Director signed the form on January 6, 1970 (Pet. App. A-2, A-3).

The government rejected petitioner Ressler's offer in compromise on May 3, 1973. Thus, the offer in compromise was pending from January 6, 1970 until May 3, 1973, a period of three years, three months, and 27 days. Pursuant to Section 6502(a) and the terms of the agreement, the statute of limitations was extended for one year more than the period during which the offer was pending, or four years, three months, and 27 days, or until August 4, 1975 (Pet. App. A-3). Since the government commenced this suit on August 1, 1975, the court below correctly held that it was commenced within the time limitations of the agreement and the statute.

2. Petitioners argue (Pet. 5) that this suit is barred by the statute of limitations because Ressler's offer of a compromise should be deemed to be terminated as of the date of his sentencing on February 26, 1973, and not, as the decision below held, on May

3, 1973, when the Internal Revenue Service rejected the offer. If, as petitioners submit, the offer terminated on that earlier date, the statute of limitations would have expired on May 28, 1975 rather than August 4, 1975. In support of this contention, petitioners rely (Pet. 5-7) upon *Coy* v. *United States*, 377 F.2d 925 (9th Cir. 1967), and assert that it conflicts with the decision below.

The plain language of the agreement extending the statute of limitations in accordance with Section 6502(a) supports the decision below. As the court of appeals pointed out (Pet. App. A-3), "[t]he purpose of giving a waiver, in connection with an offer of compromise, is to enable the Government to consider the offer without suffering prejudice because of the running of the statute of limitations against the collection of the tax while the offer is being considered." *United States* v. *Harris Trust & Savings Bank*, 390 F.2d 285, 287-288 (7th Cir. 1968); *United States* v. *Havner*, 101 F.2d 161, 163 (8th Cir. 1939). Here, Ressler's offer was pending from January 6, 1970, when the District Director signed the waiver form, until May 3, 1973, when the government rejected the offer. That latter date, and not the date of Ressler's sentencing, is the relevant one for measuring the extent to which the period of limitations was enlarged. As the court below concluded (Pet. App. A-4 to A-5), "There is nothing necessarily inconsistent from the Government's standpoint in prosecuting for fraud and still considering an offer of compromise of the civil liability for tax." Thus, Ress-

ler's sentencing did not terminate the pendency of his offer in compromise.

Coy v. *United States*, *supra*, upon which petitioners rely (Pet. 5-7), is distinguishable. There, as here, the taxpayer submitted an offer of compromise on the standard form containing a provision extending the statute of limitations "for the period during which the offer is pending and for one year thereafter." While the offer was pending, the Internal Revenue Service determined that the taxpayer made false representations with respect to a sum of money proffered to the government. Accordingly, the Service arranged for the taxpayer's prosecution. The court held that the government's suit for collection was time barred because the statute of limitations began to run again upon the imposition of sentence. In so holding, the court emphasized the fact that after the matter had been referred to the Department of Justice for prosecution, a memorandum from the Regional Counsel to the District Director showed the Internal Revenue Service had determined to reject the offer and directed its attention toward supporting its claim to a partial payment made by the taxpayer. In the court's view, "[t]his [was] fair evidence that at a prior time I.R.S. had abandoned consideration of the offer" (377 F.2d at 928). Indeed, the Ninth Circuit recognized, as the court below held in this case, that "[t]here might be circumstances, even though the offer of compromise was the subject of criminal redress, where the prosecution could not be considered a rejection of the offer" (*id.* at 927 n.6).

Thus, even though the court below declined to adopt the holding of *Coy* (Pet. App. A-4), it appears that the Ninth Circuit would have likewise upheld the longer period of limitations in this case where petitioners presented no evidence that the government terminated consideration of Ressler's offer during the pendency of the criminal prosecution.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

JANUARY 1979

[4] At all events, the only assessments that are affected by the shorter suspension period urged by petitioners under their reading of *Coy* are those made on April 8 and 9, 1965, totaling $1,984.06 (R. 59-60). The government's action to reduce the remaining tax liabilities of $31,634.95 to judgment would be timely even under petitioners' computation. Thus, even assuming the existence of the conflict petitioners assert, there is, in this litigation, little at stake in its resolution.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 285537 292